

BEFORE THE

## Federal Communications Commission

WASHINGTON, D.C.

In the Matter of )

Review of the Commission's )

Broadcast and Cable )

Equal Employment Opportunity )

Rules and Practices )

MM Docket No. 98-204

Released: June 4, 2004

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Federal Communications Commission  
Office of Secretary

To: Ms. Marlene H. Dortch, Secretary  
Office of the Secretary

**JOINT PETITION FOR RECONSIDERATION AND/OR CLARIFICATION  
OF THIRD REPORT AND ORDER AND FOURTH NPRM**

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona  
Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters  
Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida  
Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of  
Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana  
Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters,  
Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association  
of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association,  
Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota  
Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters  
Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada  
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Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of

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Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association and Wyoming Association of Broadcasters (collectively, the "State Associations"), by their attorneys, hereby petition for reconsideration and/or clarification of the Third Report and Order and Fourth Notice of Proposed Rulemaking adopted on April 19, 2004 and released on June 4, 2004 in the captioned proceeding (FCC 04-103) ("*Form 395-B Order*").

The *Form 395-B Order*, *inter alia*, amended Part 73, Section 73.3612 of the Commission's rules which states as follows:

**"Section 73.3612. Annual employment report.**

Each licensee or permittee of a commercially or noncommercially operated AM, FM, TV, Class A TV or International Broadcast station with five or more employees shall file an annual employment report with the FCC on or before September 30 of each year on FCC Form 395-B.

Note to Section 73.3612: Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee's compliance with the equal employment opportunity requirements of Section 73.2080.

By this Petition, the State Associations request the Commission to take the following actions:

(1) amend the above referenced Note to read:

"Note to Section 73.3612: Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the annual employment report will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee's *or*

*permittee's compliance with the nondiscrimination or equal employment opportunity requirements of Section 73.2080. Accordingly, the Commission will not entertain any allegation or showing that a broadcast licensee or permittee has violated any aspect of Section 73.2080 on the basis that the station's workforce does not reflect a certain number of persons of a particular gender, race or ethnicity either overall or in any one or more job categories.* " (Proposed changes shown in italics); and

(2) issue its Memorandum Opinion and Order adopting the amended Note simultaneously with the issuance of (a) a Fourth Report and Order resolving the issues raised under the Fourth Notice of Proposed Rulemaking aspect of the Form 395-B Order, and (b) a Memorandum Opinion and Order resolving the issues raised under the Petitions for Reconsideration and Clarification of the Second Report and Order and Third NPRM.

Such reconsideration and/or clarification is necessary to prevent the Commission's overall EEO regulatory scheme from unconstitutionally pressuring stations to recruit and hire on the basis of race, ethnicity, and gender.

The *Form 395-B Order* was released in the context of the Commission's proceeding adopting Section 73.2080 of its regulations (the "EEO Regulations"). *See Second Report and Order and Third Notice of Proposed Rulemaking*, 17 FCC Rcd 24018 (2002), *recon. pending* ("Second Order and Third NPRM"). That fact reinforces the concern of the State Broadcasters that the data made available in FCC Form 395-B will be viewed by the Commission as relevant and material to its enforcement of the EEO Regulations and will be used by third parties to raise EEO-related compliance issues and by the Commission to evaluate a broadcast station licensee's or permittee's compliance with those EEO Regulations. As a result of this scheme, the EEO Regulations will place impermissible pressure on stations to recruit and hire based on gender, race, and ethnicity in violation of constitutional strictures articulated by the United States Court of Appeals for the District of Columbia Circuit in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998) ("*Lutheran Church*") and in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19, *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) ("*State Broadcasters*").

At first blush it might appear that the *Form 395-B Order* precludes use of the racial, ethnic, and gender employment data from use in judging compliance with any aspect of the EEO Regulations. In the second paragraph of the *Form 395-B Order*, the Commission, for example, repeats its contention “that the data collected in the employment reports would be used to compile industry employment trend reports and reports to Congress and would not be used to determine compliance with the substantive EEO rules adopted,” citing to the *Second Order and Third NPRM* at para. 17. *See also Form 395-B Order* at para. 2. However, the new Note to the amended FCC Form 395-B rule makes this unclear, to say the least. The Note states: “Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee’s compliance with the *equal employment opportunity requirements* of Section 73.2080.” (Emphasis added). Section 73.2080, however, has two components: an equal employment opportunity component (Subsection (b)) and a nondiscrimination component (Subsection (a)). The Note is therefore arguably best read to provide that, although the FCC will not use the race, ethnicity and gender data to assess compliance with the *equal employment opportunity requirements* under Subsection (b), the FCC *will allow, and indeed will facilitate*, use of the data to assess an individual broadcast licensee’s or permittee’s compliance with the *nondiscrimination requirements* under Subsection (a) of its EEO Regulations. For this reason, the Commission’s action in adopting the Note makes it appear that it has prejudged the outcome of the confidentiality issue under the Fourth NPRM.

This result is precisely what the various parties who call themselves the “EEO Supporters” want, as they have repeatedly stated on the record that they will use the race, ethnicity, and gender data contained in the FCC Form 395-B Reports to show disparities between the number of minorities on a station’s staff and compare it with the number of minorities in the

labor force generally. Indeed, Minority Media and Telecommunications Council (“MMTC”) and forty-seven other organizations filed a letter with the FCC on October 1, 2002, which provides graphic confirmation that the proposed station-attributed Form 395-B would violate the central teaching of both *Lutheran Church and State Broadcasters*. In that filing, MMTC makes clear that it intends to “liberally draw inferences from statistics” to determine whether stations are “discriminators.”<sup>1</sup> In performing statistical comparisons of the broadcasters’ employees with the local workforce, MMTC made clear its position that a difference of two standard deviations from the makeup of the local market will be enough to create a “presumption of discrimination.”<sup>2</sup> More recently, the response lodged by the Intervenor EEO Supporters in the D.C. Circuit demonstrates that these groups have used statistical evidence about minority broadcast employees as their only evidence of the “success” of earlier EEO rules; and on the basis of statistical “evidence,” these organizations repeat the outlandish and defamatory claim that “almost a quarter of large broadcasters discriminate intentionally.”<sup>3</sup> Similarly, the National Organization for Women, as Intervenor, acknowledged in their brief to the Court in *State Associations* (at 26-27) that the FCC Form 395-B will make each station “more accountable to the community.” These parties have thus made it crystal clear that they are “interested in results, not process, and [are] determined to get them.” *State Broadcasters* at 19. The reasons that reconsideration and/or clarification are necessary are therefore anything but “theoretical.”

By placing its regulatees under the threat of such charges of discrimination and resulting adverse action, the FCC has created a situation essentially identical to that found unconstitutional

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<sup>1</sup> MMTC Comments on the *NPRM* at 315.

<sup>2</sup> *Id.* at 315 n.459.

<sup>3</sup> See Response lodged by the Intervenor EEO Supporters in the United States Court of Appeals for the District of Columbia in *Maryland-District of Columbia-Delaware Broadcasters Association, Inc., et al.*, Case No. 04-1192, at 14.

in *Lutheran Church*. As was the case in *Lutheran Church*, broadcasters will be severely prejudiced by having to undergo public investigations by the FCC regarding compliance with regulations that, in overall scheme and effect, will again impermissibly pressure stations to hire based on race, ethnicity, and gender. And, as the District of Columbia Circuit has noted, “[t]he risk lies not only in attracting the Commission’s attention, but also that of third parties.”

*Lutheran Church* at 353. Moreover, the immediate effects of the regulation are apparent, particularly since “[t]he Commission in particular has a long history of employing ‘a variety of *sub silentio* pressures and “raised eyebrow” regulation . . . .” *State Associations* at 19 (citing *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978). This practice has been recognized as especially problematic when, as appears to be the case here, “[t]he agency with life and death power over the licensee is interested in results, not process, and is determined to get them.” *Id.*

Adopting the proposed changes to the Note will not, standing alone, eliminate the impermissible pressure on stations to recruit and hire based on race, ethnicity, and gender. The Commission must also make it impossible for third parties and the Commission itself to link the data provided to the identity of an FCC Form 395-B respondent, either by requiring that such Reports be sent to a third party such as BIA for receipt, logging, and collation, or by requiring the FCC to remove the identify of each respondent as soon as its Report has been logged in and checked for completeness. Furthermore, the Commission, on reconsideration of the *Second Order and Third NPRM* must clarify that the use of the phrases “difficulties in their outreach efforts,” as contained in FCC Form 396, page 3, Section II,<sup>4</sup> and “is effective and address any

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<sup>4</sup> The full text of the Section II states: “Provide a statement in an exhibit which demonstrates how the station achieved broad and inclusive outreach during the two-year period prior to filing

problems found as a result,” as contained in Question 3(f) of the Media Bureau’s May 28, 2004 EEO Audit Letter,<sup>5</sup> are intended to focus only on process and not results, and that the Commission does not want any broadcast licensee or permittee to disclose to it the gender, race, or ethnicity of any applicants, interviewees, or hirees in response to either of those or similar questions.

The Commission’s decision to compartmentalize, and to sequence its decision making on, various EEO-related issues should come to an end. The Petitions for Reconsideration and Clarification of the *Second Order and Third NPRM* have been pending for well over a year despite the fact that the EEO Regulations have been effective for roughly the same period of time. The *Form 395-B Order* has left for later decision the key issue of the confidentiality of the workforce data, the resolution of which could very well undermine the entire scheme of EEO Regulations. The State Associations appreciate the fact that the Commission has delayed the filing of the FCC Form 395-B Reports until that issue has been resolved. However, such delay standing alone is not enough to remove the impermissible pressure on stations to recruit and hire based on race, gender, and ethnicity given the present language of the Note adopted by the FCC and the failure by the FCC to resolve the issues on reconsideration of the *Second Order and Third NPRM*. Accordingly, the Commission should issue its Memorandum Opinion and Order adopting the amended Note soon and simultaneously with the issuance of (a) a Fourth Report and Order resolving the issues raised under the Fourth Notice of Proposed Rulemaking aspect of the Form 395-B Order, and (b) a Memorandum Opinion and Order resolving the issues raised

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this application. Stations that have experienced difficulties in their outreach efforts should explain.”

<sup>5</sup> Question 3(f) reads as follows: “In accordance with § 73.2080(c)(3), describe the unit’s efforts to analyze its EEO recruitment program to ensure that it is effective and address any problems found as a result.”

under the Petitions for Reconsideration and Clarification of the Second Report and Order and Third NPRM.

This Petition is filed without prejudice to any action the State Associations may take with respect to the Petitions for Reconsideration and Clarification of the *Second Order and Third NPRM* which is still pending before the FCC, or the Fourth NPRM aspect of the *Form 395-B Order*, including but not limited to dismissing any Petitions filed with respect to the EEO Regulations and proceeding to appeal such actions in court.

**Conclusion**

For all the above reasons, the Commission should take the actions requested herein by the State Associations.

Respectfully submitted,

By: 

Richard R. Zaragoza

Barry H. Gottfried

Paul A. Cicelski

*Counsel for the Named  
State Broadcasters Associations*

SHAW PITTMAN LLP  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000

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